

STATE OF MICHIGAN
COURT OF APPEALS

SHELDON KORN, GALE KORN, ASHLEY
KORN, SHAUNA KORN, KORN FAMILY
LIMITED PARTNERSHIPS, and CRANBROOK
PARK, L.L.C.,

UNPUBLISHED
June 16, 2009

Plaintiffs-Appellants,

v

UNGER, GARRATT & BACHAND, P.L.L.C.,
d/b/a UG&B, P.L.L.C.,

No. 283293
Oakland Circuit Court
LC No. 2005-064786-CK

Defendant-Appellee,

and

AMERICAN ARBITRATION ASSOCIATION,
INC.,

Defendant.

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiffs appeal by delayed leave granted the order regarding sanctions entered by the trial court and the order denying plaintiffs' motion for relief from judgment. The trial court's rulings entitled defendant Unger, Garratt & Bachand, P.L.L.C. (hereinafter defendant), to recover from plaintiffs, jointly and severally, \$35,380 in attorney fees and costs as sanctions for having filed a frivolous action. We vacate the trial court's orders, except that portion of the order regarding sanctions which indicated that defendant's request for "alternative" sanctions against plaintiffs' former counsel Riley Richard was withdrawn. Previously, Richard had also been ordered to pay sanctions, but he successfully challenged the order on appeal to this Court, *Korn v Unger*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2007 (Docket No. 266961), which reversed and vacated the order. Plaintiffs did not join in the appeal, and defendant sought to enforce the sanction order against plaintiffs following the issuance of the *Korn* opinion by this Court, despite the fact that the first *Korn* panel vacated the sanction order. Subsequently, the trial court allowed the earlier sanction order to stand against plaintiffs, as reflected in the order regarding sanctions, and plaintiffs' later motion for relief from judgment was denied. Additional facts can be found in *Korn, supra*.

Plaintiffs first argue that because jurisdiction had been vested in this Court due to the prior appeal and the trial court did not reacquire jurisdiction until this Court returned the lower court record, the trial court lacked jurisdiction to enter its order regarding sanctions before the record was returned. We agree, but conclude that the trial court's error in exercising jurisdiction was harmless. The issue of whether a trial court has jurisdiction over a claim is a question of law that this Court reviews de novo. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

A trial court does not reacquire jurisdiction over a case from this Court until this Court returns the original record to the trial court. *Luscombe v Shedd's Food Products Corp*, 212 Mich App 537, 541; 539 NW2d 210 (1995) (jurisdiction not reacquired until remittitur filed; therefore, trial court "erred in conducting proceedings on remand from this Court before the record was returned"); MCR 7.215(F)(1)(b) ("execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned"). If there is no dispute that the trial court generally had subject-matter jurisdiction over a case, actions taken before return of the record are "merely voidable as the erroneous exercise of jurisdiction." *Luscombe, supra* at 542. However, where there is no objection "to the proceedings conducted in the circuit court before this Court's return of the record, the error in conducting those proceedings [is] harmless." *Id.* at 544. Here, plaintiffs do not contest that the trial court had subject matter jurisdiction over the action, and they failed to object to the trial court's premature exercise of jurisdiction. Accordingly, the error was harmless, and plaintiffs are not entitled to relief on this basis.

Plaintiffs next argue that the trial court's order regarding sanctions contravened the law of the case doctrine. We agree, given the particular circumstances presented, which includes the entry of a single sanction order (prior to first appeal) pursuant to which plaintiffs and Richard were jointly and severally liable, and which order was vacated in its entirety. The issue of whether a trial court violated the law of the case doctrine is a question of law that is reviewed de novo by this Court. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).¹

Our Supreme Court has explained that, pursuant to the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981); see also, *Ashker, supra* at 13 ("The law of the case doctrine holds that a ruling by an appellate court on a particular legal issue binds the appellate court and all lower tribunals with respect to that issue."). The law of the case doctrine applies to legal questions actually decided, explicitly or implicitly, in the prior appeal. *Lopatin, supra* at 260.

¹ Defendant contends that plaintiffs did not raise a law of the case argument below; however, a review of the record indicates that plaintiffs did indeed argue at the court hearing on the motion for relief from judgment that the law of the case doctrine barred sanctions being enforced against plaintiffs.

In the prior appeal, this Court, in pertinent part, ruled as follows:

By including a request for attorney fees and costs associated with this action in the arbitration proceeding, defendant agreed to forego its right to recover those same expenses in this action before the trial court. See *St George Greek Orthodox Church of Southgate, Michigan v Laupmanis Associates, PC*, 204 Mich App 278, 283; 514 NW2d 516 (1994). Although defendant asserts that it did not recover all of its requested fees in arbitration, it is undisputed that defendant submitted a claim for its expenses in this action to the arbitrator, and it is clear from the face of the arbitrator's award that the award encompasses "all claims asserted." Thus, the amount of defendant's expenses associated with this action was decided by the arbitrator and defendant was not entitled to seek further recovery in this action.

* * *

Whether labeled as sanctions or otherwise, those costs and attorney fees were undisputably encompassed within the arbitration award and, therefore, could not be separately pursued or awarded in this action.

We disagree with defendant's argument that the two awards are not duplicative because the arbitrator's award is enforceable only against plaintiffs, whereas the trial court's award applies to both plaintiffs and their attorney, appellant Richard. This distinction is immaterial considering the purpose of both awards is to compensate defendant for the cost of having to defend this action. Again, defendant is only entitled to recover its costs and attorney fees once, and allowing both awards to stand would amount to punitive damages.

For these reasons, the trial court erred in awarding defendant attorney fees and costs under MCR 2.114 and MCL 600.2591. The trial court's order is therefore reversed and vacated. [*Korn, supra*, slip op at 3-4.]

We conclude that the trial court erred in ordering sanctions against plaintiffs and in denying the motion for relief from judgment.² The rulings were contrary to the law of the case doctrine, where this Court, in the prior appeal, actually and explicitly decided that such sanctions constituted a double recovery of attorney fees and "would amount to punitive damages." *Korn, supra*, slip op at 4. Here, it is undisputed that the sanctions awarded by the trial court, in the amount of \$35,380, are precisely the same sanctions that this Court concluded were improper in *Korn, supra*. This Court reversed and vacated the award of sanctions, effectively finding the order null and void. Contrary to defendant's argument, this Court's ruling in the prior appeal was not limited to appellant Richard only; rather, this Court decided that the award of sanctions itself was improper in this case because "defendant agreed to forego its right to recover those

² The court's order regarding sanctions simply provided that this Court's decision was inapplicable to plaintiffs because they did not appeal the 2005 order awarding sanctions.

same expenses in this action before the trial court.” *Id.* at 3. The *Korn* panel’s ruling necessarily encompassed all aspects of the sanction order; defendant is not permitted to engage in supplementary collection proceedings on a vacated, void order.

Assuming this Court erroneously vacated the trial court’s 2005 sanction order in its entirety, instead of vacating the order as it applied to Richard only, this Court has held that even where a prior decision was incorrect, more is necessary to overcome the application of the law of the case doctrine. *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002). The party seeking to avoid the application of the law of the case doctrine must demonstrate that the facts relied upon by this Court when making its prior decision had substantially and materially changed, or that there was an intervening change in the law. *Id.* In *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992), this Court reasoned that a subsequent conclusion that a prior decision was incorrect was insufficient to overcome the application of the law of the case doctrine:

To [ignore the law of the case doctrine] would vitiate that doctrine because it would allow this Court to ignore the prior decisions in a case merely because one panel concluded that the earlier panel had wrongly decided the matter. It would, therefore, reopen every case to relitigation of every issue previously decided in hopes that a subsequent panel of the Court would decide the issue differently than did the prior panel. Clearly, the law-of-the-case doctrine has no usefulness if it is only applied when a panel of this Court agrees with the decision reached by a prior panel.

Here, defendant fails to demonstrate or even argue that the facts have materially and substantially changed since this Court rendered its decision in *Korn*, *supra*. Rather, defendant, with all deliberate speed, sought the entry of an order for precisely the same attorney fees and costs that this Court deemed improper in *Korn*. We hold that the trial court violated the law of the case doctrine when it entered the order regarding sanctions as to plaintiffs and when it denied the motion for relief from judgment. Accordingly, those orders are vacated.

Furthermore, and aside from the law of the case doctrine, relief from judgment is appropriate under MCR 2.612(C)(1)(d) (“judgment is void”) and (e) (“it is no longer equitable that the judgment should have prospective application”). Further, plaintiffs filed the motion for relief from judgment within a “reasonable time,” satisfying MCR 2.612(C)(2), and, contrary to defendant’s argument, plaintiffs’ motion was not a disguised motion seeking reconsideration under MCR 2.119(F).

Defendant argues that because plaintiffs’ subsequent motion for relief from judgment sought relief from the November 14, 2005, order of the trial court granting defendant’s motion for sanctions, and did not seek relief from the May 30, 2007, order regarding sanctions, the May 30, 2007, order remains valid and enforceable. This argument lacks merit. The record reveals that plaintiffs argued against enforcement of the 2005 order and against entry of the order regarding sanctions, pointing to this Court’s ruling. The bottom line of plaintiffs’ position was that defendant should not be allowed to collect sanctions against plaintiffs given this Court’s prior ruling.

After contemplation of all of the arguments presented by defendant, including the res judicata and equitable estoppel claims, which we reject, we conclude that, under either the law of the case doctrine or MCR 2.612(C)(1)(d) and (e), the trial court erred in its rulings.

Defendant also argues that plaintiffs were contractually obligated to pay defendant \$35,380 in sanctions regardless of this Court's decision in *Korn, supra*. Defendant fails to cite any authority to support its position that plaintiffs remain jointly and severally liable under contract to pay the sanctions imposed by the trial court, even where the trial court's order imposing the sanctions was vacated by this Court, thus voiding the debt defendant contends plaintiffs remain liable to pay. Aside from case law cited in the standard of review section of its brief, defendant cites no authority whatsoever in support of its position and argument. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Thus, we conclude that defendant has abandoned this issue on appeal for want of sufficient briefing, and we decline to address it. *Wilson, supra* at 243.

We vacate the trial court's orders regarding sanctions and denying relief from judgment, except that portion of the order regarding sanctions which indicated that defendant's request for "alternative" sanctions against plaintiffs' former counsel Riley Richard was withdrawn. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray